Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1774

HELEN McCAFFREY JACKSON, ET AL.,
Petitioners

v.

ASSOCIATED HOSPITAL SERVICE
OF PHILADELPHIA, ET AL.,
Respondents

BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATED HOSPITAL SERVICE OF PHILADELPHIA

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QUESTION PRESENTED

Did not the courts below correctly conclude that petitioners had failed to establish a basis for federal jurisdiction (a) where the challenged conduct was that of private entities operating independently and differently and without any nexus between their conduct and the state, and (b) where a private conspiracy was alleged but there was no contention that such conspiracy was motivated by a class-based, invidiously discriminatory animus?

STATEMENT OF THE CASE

The Petition for Certiorari comes before this Court following dismissal of plaintiffs' Complaint for lack of federal jurisdiction—and not (contrary to the assertion of the Petition) for failure to state a cause of action.

Petitioners asserted the existence of federal jurisdiction based upon alleged violations by respondents of 42 U.S.C. §§ 1981, 1983, and 1985 and of the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States. In their Answers, respondents denied the existence of federal jurisdiction.

Subsequent to the decision of this Court on December 23, 1974, in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), the District Court ordered the parties to complete discovery, to submit a stipulation of facts on the jurisdictional issues, and to brief those issues. Petitioners conducted extensive discovery. A stipulation of facts with numerous exhibits was filed. Briefs were filed. Oral argument was heard. The District Court concluded that the record disclosed no basis for federal jurisdiction. (Petition for Certiorari A-6.)

Petitioners are six females and two males who alleged that they have been discriminated against by respondents on the bases of their sexes and their religious beliefs. Petitioners contend that respondents' conduct violates petitioners' preference that pregnancies be terminated by live births rather than by any other event.

Respondent, The Associated Hospital Service of Philadelphia (hereinafter identified as "Blue Cross"), is a nonprofit corporation which operates a nonprofit hospital plan providing certain hospital services to its subscribers. Blue Cross is a separate and distinct entity from respondent, The Medical Service Association of Pennsylvania (hereinafter "Blue Shield"), a nonprofit corporation pro-

viding certain medical services to its subscribers. Some, but not all, Blue Cross subscribers are also Blue Shield subscribers; similarly, some, but not all, Blue Shield subscribers are also Blue Cross subscribers. The Insurance Commissioner and Secretary of Health of the Commonwealth of Pennsylvania are also respondents.

Like all Pennsylvania corporations Blue Cross and Blue Shield owe their existences to enabling legislation. Like all insurers in Pennsylvania they are subject to specific statutory regulation and to the administrative regulation of the Pennsylvania Insurance Department.

Blue Cross operates primarily in the counties of Philadelphia, Montgomery, Delaware, Chester, and Bucks in southeastern Pennsylvania. It is one of five "Blue Cross" plans in Pennsylvania.

The challenged conduct of Blue Cross is the provision in *some* of its agreements with its subscribers that hospital benefits related to giving birth be provided only: (1) if the Blue Cross subscriber is enrolled under family coverage at a subscription rate in excess of that charged to a single person (Complaint, ¶¶ 15 and 16); (2) if the subscriber has been enrolled for eight consecutive months (Complaint, ¶¶ 15 and 16); and (3) if the subscriber is married (Complaint, ¶ 16). Petitioners also object to the limitation of six days of hospital benefits for birth. (Complaint, ¶ 18).

Petitioners object to Blue Cross' historical policy of treating miscarriages and abortions differently from births. For hospital services for miscarriages and abortions Blue Cross does not require an eight-month waiting period, does not require coverage under the family plan, and does not impose a six-day limitation on hospital stays.

These alleged differences in coverages, petitioners contend, discriminate against petitioners' "civil rights to bear children" and "religious beliefs." (Complaint, ¶ 20). Also, petitioners contend that they are being discriminated

against in that they are required to pay higher premiums to underwrite the hospital benefits being provided to persons having abortions. (Complaint, ¶ 21).

Petitioners fail to note that among the exhibits before the district court were two Blue Cross contracts in which some of the challenged contractual provisions do not appear. One exhibit was an example of a Blue Cross agreement which provides maternity benefits to all females (including unmarried minor female dependents) without any requirement that unmarried females be enrolled in family coverage. Another exhibit was an agreement in which Blue Cross had waived any waiting period for maternity coverage. Other material provisions of the Blue Cross subscription agreements before the district court were, for example, a general provision that for complications of pregnancy the subscriber may utilize the maximum number of days available under her agreement (and not be limited to a six-day hospitalization); limitations for non-maternity hospitalizations; and limitation of all hospitalizations to what is reasonable and necessary. Further, the eight-month waiting period for maternity benefits in some agreements is more favorable than the usual twelve-month waiting period applicable to pre-existing conditions.

Blue Cross' conduct is alleged to be that of the state "because the state of Pennsylvania through its Insurance Commissioner and Secretary of Health license [Blue Cross and Blue Shield] and approve contracts" [*sic*] allegedly containing the challenged provisions. (Complaint, ¶ 25). Also, it is alleged that Blue Cross "operates under the supervision of the Insurance Department of the Commonwealth of Pennsylvania. . . ." (Complaint, ¶ 4).

Finally, petitioners allege a conspiracy by the four respondents against petitioners and the class they seek to represent. (Complaint, ¶ 23). The "class", although never

specifically defined, is variously referred to as "all females" and "all subscribers" (female and male) allegedly injured by the challenged conduct. (Complaint, ¶ 26).

Petitioners also fail to note that the challenged Blue Cross subscription agreement was "approved" by the Pennsylvania Insurance Department long before the 1973 decisions of the United States Supreme Court and the Pennsylvania Supreme Court holding restrictions on abortion unconstitutional. Thus, at the time the challenged agreements were adopted by Blue Cross, elective abortion was illegal in Pennsylvania and the challenged benefits related primarily to miscarriages and the very few therapeutic abortions then permissible under Pennsylvania law.

Although petitioners state as "facts" many matters not of record as well as many matters which are simply incorrect, it is not necessary to this Court's review that such statements be specifically rebutted at this time.

ARGUMENT

I. The courts below correctly decided that the facts of record clearly demonstrated that the challenged conduct was private and that there was no state action such as would confer federal jurisdiction.

The mere statutory requirement of prior approval by the Insurance Department of Blue Cross' rates and subscription agreements without a relationship to the challenged practice is insufficient to establish state action.

Blue Cross was originally organized pursuant to the Non-profit Hospital Plan Act, Act of June 21, 1937, P.L. 1948, 40 P.S. (Pa.) § 1401 *et seq.* That statute was amended by the Act of Nov. 15, 1972, P. L. , No. 271, 40 Pa. C.S.A. § 6101, *et seq.* Those statutes provide for the prior approval by the Insurance Department of Pennsylvania of Blue Cross' rates charged to subscribers, rates of payments to hospitals, acquisition costs in connection with solicitation of subscribers, reserves, certificates representing agreements with subscribers, and contracts with hospitals.

The authority conferred on the Insurance Department by these statutory provisions is the primary basis for petitioners' assertion that the challenged conduct constitutes state action. The challenged conduct, however, involves Blue Cross' underwriting requirements relating to waiting periods for, and persons entitled to, maternity benefits and relating to contractual limitations on hospital stays for maternity. Petitioners complain that these requirements are more stringent with regard to maternity (i.e., live birth) than with regard to abortion.

In determining that there was no state action, the district court correctly applied the holding of this Court in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). In *Jackson* this Court held:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. *Moose Lodge No. 107* v. *Irvis, supra.* at 176-177. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n* v. *Pollack,* 343 U.S. 451, 462 (1952). 419 U.S. at 350.

This Court set forth in *Jackson* what inquiry must be made by federal courts in determining whether allegedly wrongful conduct will be deemed to be state action:

> But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. 419 U.S. at 351.

The district court made the required inquiry. It correctly analyzed the requirements of *Jackson* and concluded that the conduct of which petitioners complained did not constitute state action.

Petitioners contend that the district court erred because the conduct challenged by them was specifically approved by the Pennsylvania Insurance Department pursuant to statutory mandate. This is incorrect factually. Moreover, even if factually accurate, this would not constitute state action under *Jackson.*

The challenged conduct is, with respect to Blue Cross, Blue Cross' policy of requiring *in some instances* different limitations on benefits for hospitalizations for live births than for all other terminations of pregnancies. These underwriting requirements have never been the subject of action of the Insurance Department. Not only did petitioners submit nothing to show state regulation, but many

of the very documents relied upon by petitioners demonstrated the absence of state action.

Central to an understanding of the underlying facts is awareness that prior to 1973 elective abortions were unlawful in Pennsylvania by reason of the Act of June 24, 1939, P.L. 872, §§ 718-719, 18 P.S. §§ 4718-4719. Following the decision of the United States Supreme Court on January 22, 1973, in *Roe* v. *Wade*, 410 U.S. 113, the Pennsylvania Supreme Court held on March 29, 1973, that the Pennsylvania abortion statute was unconstitutional. *Commonwealth* v. *Page*, 451 Pa. 331, 303 A.2d 215 (1973).

Since that time the Insurance Department has had no occasion to pass upon the Blue Cross subscription agreements which petitioners challenge.

At the time that Blue Cross submitted the relevant subscription agreements to the Insurance Department for review, there was no reason to consider the issues raised by petitioners herein because only involuntary premature terminations of pregnancy were within the scope of the agreements. (Otherwise, those portions of the agreements would then have been void for illegality.) Not surprisingly, therefore, the state had no occasion to review the alleged disparity.

Further, neither the enabling statutes nor the Insurance Department's regulations confer on the Department the right to review underwriting requirements of Blue Cross Plans. And the underwriting requirements have not been reviewed. For example, the record below showed that Blue Cross changed from a nine-month to an eight-month waiting period for maternity benefits in 1969 without any Insurance Department hearings. Also, there was evidence that providing maternity benefits on family or single contracts was a matter of underwriting, rather than of contracts or rates. Blue Cross' underwriting requirements are not subject to Insurance Department review. *Broderick* v. *Associated Hospital Service of Philadelphia*, 536 F.2d 1 (3d Cir. 1976).

The flaw in petitioners' position becomes even more obvious when it is recognized that Blue Cross does make available on some group contracts hospital benefits for live birth without waiting periods and without regard to marital status. The state's conduct in "approving" Blue Cross agreements in this area is neutral.

In an attempt to avoid the inevitable result of *Jackson*, therefore, petitioners contend that there exists a symbiotic relationship between Blue Cross and the Commonwealth of Pennsylvania such as was found in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Petitioners' reference to *Burton* is inapposite. In that case the state had insinuated itself into a position of interdependence with a private restaurant to the extent that it was a joint participant in the restaurant enterprise. No such interdependence exists in the present case. Blue Cross does not lease any facilities from the Commonwealth of Pennsylvania. Blue Cross alone is responsible for the provision of hospital services to its subscribers. Although it pays no taxes (other than unemployment compensation and F.I.C.A. taxes), this exemption is common to all nonprofit corporations.

Petitioners contend that "Blue Cross has seven public directors appointed by the Governor, Mayor, etc." (Petition at p. 6.) Actually, Blue Cross' directors are elected by its subscribers (except that its president and the chairperson and vice-chairperson of its Consumer Advisory Committee are ex-officio directors). The Governor of Pennsylvania, Mayor of Philadelphia, President of City Council of Philadelphia, and each of the Boards of Commissioners of the Counties of Bucks, Chester, Delaware, and Montgomery are permitted to submit one nominee to the nominating committee. All nominees must stand for election. There are 37 directors.

Blue Cross enjoys no special relationship with any governmental entity. It competes with profit-making insurers for the opportunity to insure public employees, and as to those agreements on which it competes successfully it is like any other governmental supplier.

The mere regulations of Blue Cross by the Insurance Department does not constitute symbiosis. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

The record below demonstrated conclusively that Blue Cross—like Metropolitan Edison Company—is a heavily regulated private corporation, not unlike all insurance companies operating in Pennsylvania which are also heavily regulated under separate statutes. This is insufficient to connect the conduct of Blue Cross to the Commonwealth so as to make Blue Cross' conduct attributable to the Commonwealth. *Jackson* v. *Metropolitan Edison Co., supra.*

Nor is this a public function case such as *Marsh* v. *Alabama*, 326 U.S. 501 (1946), *Terry* v. *Adams*, 345 U.S. 461 (1953), or *Evans* v. *Newton*, 382 U.S. 296 (1966). Blue Cross does not exercise a power delegated to it by the Commonwealth which is traditionally associated with sovereignty. There is no obligation of the Commonwealth to provide hospital insurance. Nor is hospital insurance or provision of hospital services traditionally the exclusive prerogative of the Commonwealth. Accordingly, Blue Cross is not serving a public function.

Neither the record in this matter nor even the allegations of the Complaint disclose the existence of state action. To the contrary, the Commonwealth is clearly neutral on the matters which petitioners contest. The Commonwealth's conduct has allowed Blue Cross to alter at will its waiting period for maternity benefits and to waive its requirements where it so desires; it has permitted Blue Cross to provide maternity coverage to unmarried females without requiring those persons to enroll for family coverage. Although there is a limitation

on hospital stays for maternity under the Blue Cross of Greater Philadelphia agreements, there is no such limitation under the agreements of Blue Cross of Northeastern Pennsylvania which are also subject to Insurance Department approval.

Petitioners' contention that state action exists because Blue Cross' conduct is allegedly in violation of its contracts does not merit serious consideration.

Similarly non-meritorious is petitioners' contention that state action can be found by reason of the Insurance Department's failure to act. Initially, it is doubtful that the Insurance Department can affirmatively require Blue Cross to change its coverages. Although the Insurance Department has in recent years raised questions concerning maternity coverage, no action has been taken.

All the foregoing matters were considered by the district court and the court of appeals. Their decisions were in complete harmony with the controlling decisions of this Court.

Even if petitioners had met the threshold jurisdictional requirement, however, their cause of action would be non-meritorious. The state has broad power to encourage actions deemed to be in the public interest, and making either childbirth or abortion economically more attractive is not an impingement on a Constitutional right so long as no restriction on access to the alternative is imposed. *Maher* v. *Roe*, 45 U.S. L.W. 4787 (U.S. June 20, 1977).

II. The courts below correctly decided that no facts were pleaded or offered which would support a finding of federal jurisdiction under 42 U.S.C. § 1985.

Prior to the decision in *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), it had been thought that 42 U.S.C. § 1985(3) reached only conspiracies arising under color of state law. In *Griffin* it was held that 42 U.S.C. § 1985(3) does reach private conspiracies to deprive others of cer-

tain rights, privileges, and immunities but only where there is an invidiously discriminatory motivation on the part of the alleged conspirators. 403 U.S. at 102. § 1985(3) was not intended to confer federal jurisdiction over all conspiratorial interferences with the rights of others. 403 U.S. at 101. There must be an intent to deprive off *equal* protection or *equal* privileges and immunities, and therefore " . . . there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behiind the conspirators' action. The conspiracy, in other wordss, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102. Decisicon was specifically reserved as to whether § 1985(3) applied to discrimination on any basis other than race. 403 U.S. at 102 n.9.

The absence of a conspiracy arising under thee color of state law has been demonstrated by the immeediately preceding section of this Brief. Petitioners have similarly failed to set forth any basis for federal jurisdictiom under § 1985(3) and have failed to plead a cause of actiom under that statute.

Petitioners contend that they have brought themselves within the ambit of § 1985(3) by pleading in Parragraph 23 of their Complaint that respondents "conspireed with each other for the purpose of depriving the Plaintiiffs and the class they represent of equal protection of the laws and of equal privileges and immunities. . . ." Whatt class? Neither the Complaint nor the Petition for Cerrtiorari identifies the class. Indeed, in their Petition, petiitioners assert at page 17: "The limits of the class depemd ultimately on which constitutional right the court hmolds is violated."

It cannot reasonably be contended that respoondents had a class-based animus when petitioners themselves admit that the "class" cannot be determined untiil some court finds that some constitutional right hass been violated.

Petitioners allege in Paragraph 20 of the Complaint that they are being discriminated against "for their religious beliefs." They also allege in Paragraph 25 of the Complaint that respondents' conduct denies Blue Cross and Blue Shield subscribers "freedom of choice, conscience and religion." Nowhere else is religion mentioned by petitioners. Indeed, in Paragraph 21 it is alleged that respondents' conduct discriminates against *all* subscribers of Blue Cross and Blue Shield.

There was no allegation that petitioners all belong to any particular religion, but in their brief in the Court of Appeals and in their Petition for Certiorari petitioners say that they are all Catholics. Yet it is not alleged nor contended that Catholics are the target of the "conspiracy." Moreover, petitioners speak only of their religious beliefs and fail to suggest how their free exercise of religion has been affected, or how it could be affected.

There is, of course, no allegation of class-based discriminatory animus. The absence of this essential allegation of a § 1985 action is fatal to petitioners' action.

Not only have petitioners failed to make the requisite clear showing of invidious, purposeful and intentional discrimination, but they have alleged in effect that respondents' conduct is nondiscriminatory since it falls equally on all subscribers. (Complaint at ¶¶ 21 and 25.)

In addition, it is clear from the chronology of Blue Cross' conduct that there could have been no intent to discriminate against persons of any particular religious belief. The challenged differences in treatment of benefits for live birth as opposed to benefits for abortion commenced at least as early as 1961. At that time, elective abortion was illegal in Pennsylvania. Thus, the different requirements for hospitalization arising out of pregnancies terminating other than in live birth related only to mis-

carriages and therapeutic abortions. There is no suggestion that provision for such occurrences (which, at that time, were actuarially insignificant in relation to live births) was or is violative of any religious belief. To the contrary, it is clear that petitioners' objection is solely with provision of hospital benefits for elective abortions which have become legal only since 1973—long after the challenged provisions were adopted.

Similarly, petitioners fail to set forth facts from which invidious discrimination on the basis of sex can be found. It is alleged that respondents' conduct has caused harm equally to petitioners, some of whom are female and some of whom are male. More significantly, it is clear that disparity of treatment for pregnancy-related benefits does not in itself constitute a denial of equal protection or of equal privileges and immunities. *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), *General Electric* v. *Gilbert*, 97 S. Ct. 401 (U.S. Dec. 7, 1976).

Moreover, the basic charge of conspiracy between Blue Cross and Blue Shield is belied by the very instance of alleged harm cited by petitioners in their Complaint. Petitioners, Helen and Andrew Jackson, claim that Blue Cross wrongfully failed to pay their claim for hospital benefits for the birth of their child, Andrew McCaffrey Jackson. But their claim against Blue Shield for medical services for that same birth was paid by Blue Shield.

Even if petitioners had pleaded or submitted facts[1] sufficient to invoke federal jurisdiction under 42 U.S.C.

[1] Petitioners' assertion that they were permitted no discovery on the conspiracy issue is mistaken. They sought no discovery for the first 16 months after the Complaint was filed. Thereafter, they took extensive discovery seeking to find some basis for their allegations and submitted to the district court matters which they contended were supportive of their conspiracy theory. Petitioners are similarly mistaken about the briefing of the § 1985(3) claim. This issue was discussed at length at pages 3 through 8 of the Response of Defendant Blue Cross to Plaintiffs' Brief on Jurisdictional Issues, in which *Griffin* v. *Breckenridge*, *supra*, and its progeny were analyzed at length.

§ 1985(3), however, the challenged conduct does not constitute a violation of any protected right, privilege or immunity of petitioners. *Maher* v. *Roe*, *supra*. There is no discrimination against a suspect class where an economic incentive is provided for one of two alternative methods of terminating pregnancy. *Id.*

III. There is no conflict between the decisions of the Third and Sixth Circuits.

Petitioners contend that the decision of the Third Circuit is in conflict with that of the Sixth Circuit in *Meredith* v. *Allen County War Memorial Hospital Commission*, 397 F.2d 33 (6th Cir. 1968). In *Meredith*, it was found that the challenged conduct occurred under color of law, but that case was decided prior to this Court's controlling decision in *Jackson* v. *Metropolitan Edison Co.*, *supra*. Further, Blue Cross receives no state or federal funds except for services rendered on a contractual basis.

CONCLUSION

For the reasons set forth above the Petition for Writ of Certiorari should be denied.

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